At the trial, the court admitted evidence as to the conduct of the Winnipeg strike, introduced to show the nature of the mass strike.[30] If advocacy of anarchy is to be a crime, it seems eminently fair to take testimony as to what the defendant actually did advocate, rather than to rely upon the preconceived notions of judge and jury.[31] But owing to the complexity of social and political phenomena, the admission of such evidence may greatly complicate the conduct of the trial.[32]

JUDICIAL DISCRETION IN THE FILING OF INFORMATIONS. — In his summary of the Cleveland Survey,[1] Dean Pound has demonstrated how it is sought to avoid the mechanical operation of legal rules in our administration of criminal justice by a series of devices introducing the element of discretion. A judge's assertion of discretionary power in a situation which the Dean's enumeration does not include, raises an interesting problem.[2] An application was made for leave to file informations under the Migratory Bird Treaty Act. The application disclosed a *prima facie* violation of the regulations. Leave to file the informations was denied, the court saying that, "Each and all of them (informations) are too trivial to warrant setting in motion the elaborate and ponderous machinery of this Federal Court to try them." [3]

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v. Patten, 246 Fed. 24, 38 (2d Circ., 1917). *Cf.* United States *v.* "Spirit of '76," 252 Fed. 946 (S. D., Cal., 1917); State *v.* Fox, 71 Wash. 185, 127 Pac. 1111 (1912). And see Pierce *v.* United States, 252 U. S. 239, 249 (1920). See also 33 HARV. L. REV. 442. Elaborate discussion of this difficult question is found in CHAFEE, *op. cit.*, 24–31, 37–39, 49–52, 154–159, 173–180, 213–219. See also Herbert F. Goodrich, *supra*, 19 MICH. L. REV. 487, 491 *et seq.*; Zechariah Chafee, Jr., "Freedom of Speech in War time," 32 HARV. L. REV. 932, 948 *et seq.*; James Parker Hall, "Free Speech in War Time," 21 COL. L. REV. 526, 531 *et seq.*; John H. Wigmore, "Abrams *v.* U. S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time," 14 ILL. L. REV. 539, 545 *et seq.*; and see 33 HARV. L. REV. 442.

[30] The trial court confined the witness to testimony that the employees of various public services went on strike, and excluded evidence as to the effect of the strike upon Winnipeg and its people. See People *v.* Gitlow, 136 N. E. 317, 321 (1922).

[31] Similar evidence has been held admissible by the Illinois court. People *v.* Lloyd, 136 N. E. 505, 531 (Ill., 1922). As to the wisdom of admitting evidence concerning the social or economic conditions advocated or complained of by those on trial for using words of danger or bad tendency, see CHAFEE, *op. cit.*, 132–137. See also Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 DIAL, 647.

[32] Fairness demands, of course, that defendants, as well as the state, be allowed to introduce evidence concerning the rather speculative nature of the state of affairs advocated.

[1] See ROSCOE POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY, 10, 11. These devices include the dispensing power exercised at different stages and in varying degrees by police, prosecuting-attorneys, grand-juries and petit juries. There must be added judicial discretion as to sentence or suspension or mitigation of sentence, administrative parole or probation, and executive pardon.

[2] *In re* Informations under Migratory Bird Treaty Act, 281 Fed. 546, 548 (D. Mont., 1922). For the facts of this case see RECENT CASES, *infra*, p. 219.

[3] *In re* Informations under Migratory Bird Treaty Act, *supra*, at 549.

The proceeding by information in the King's name, in criminal cases, is said to be as old as the common law itself.[4] Informations, according to Blackstone, were brought, either *ex officio* by the Attorney General in the King's own suits, or were filed by the Master of the Crown-Office in the Court of King's Bench in cases where the King was the nominal prosecutor on the relation of some informer.[5] Hawkins[6] says that in fact all misdemeanors, but not capital crimes or misprision of treason, could be prosecuted by the information either of the Attorney General or the Master of the Crown-Office. At common law, informations were merely the accusation of these officers, who were perfectly free in bringing them. The law was modified by an early statute[7] which in effect required the Master of the Crown-Office to procure leave of court to file an information.[8] The statute did not attempt to define the court's discretion in granting such leave but under it the judge's power to deny leave, even in face of a *prima facie* case for prosecution, was quite broad.[9] The statute did not attempt to limit, indeed expressly excepted from its operation, the *ex officio* information. As well after the passing of this statute as before, the Attorney General had a right to file informations merely on his oath of office and without court leave.[10] In our state courts informations were used at an early day.[11] They were later resorted to in the federal courts,[12] although but rarely until recent times. And the weight of authority is that it is the *ex officio* information which prevails in our law.[13] Subject to constitutional and statutory limitations and changes, the prerogative of the English Attorney General is vested in our prosecuting attorneys.

In the courts of the United States, the Fifth Amendment to the Constitution clearly prohibits the prosecution by information of capital or infamous crimes.[14] It is equally clear under the Fourth

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[4] See BLACKSTONE, COMMENTARIES, Bk. IV, 309.

[5] *Ibid.*, at 308.

[6] See 2 HAWKINS, PLEAS OF THE CROWN, c. 26, §§ 1, 3.

[7] See 4 & 5 WM. & MA. c. 18 (1692).

[8] The practice under this act was to grant leave only after the taking of certain preliminary steps, a motion supported by affidavit and made in open court, a rule to show cause, and the filing of a recognizance by the prosecutor. See HAWKINS, *op. cit.*, c. 26, § 8; MATTHEWS, DIGEST OF THE CRIMINAL LAW, 288.

[9] The King *v.* Morgan, 1 Doug. 314 (1780); The King *v.* Compton, Cald. 246 (1783). See HAWKINS, *op. cit.*, c. 26, § 9; BACON, ABRIDGEMENT, title, INFORMATION (D); CHITTY, CRIMINAL LAW, 2 ed., 852 *et seq.* *Cf.* 55 SOL. J. 199.

[10] The King *v.* Phillips, 3 Burr. 1564 (1764).

[11] State *v.* Dover, 9 N. H. 468 (1838); State *v.* Kittery, 5 Green (Me.) 254. (1828). See Comm. *v.* Waterborough, 5 Mass. 256, 257 (1809).

[12] United States *v.* Waller, 1 Sawy. 701, Fed. Cas. No. 16634 (Circ. Ct. D. Cal., 1871).

[13] Weeks *v.* United States, 216 Fed. 292 (2nd. Circ., 1914); State *v.* Dover, *supra.* *Cf.* State *v.* Kelm, 79 Mo. 515 (1883); United States *v.* Thompson, 251 U. S. 407, 414. See 1 BISHOP, NEW CRIMINAL PROCEDURE, 2 ed., § 144; CLARK, CRIMINAL PROCEDURE, 2 ed., § 49; 3 FOSTER, FEDERAL PRACTICE, 6 ed., § 494, *Contra* United States *v.* Smith, 40 Fed. 755 (Circ. Ct. E. D. Va., 1889).

[14] Whether a crime is infamous depends upon the punishment. If punishable by imprisonment in a state prison or penitentiary for over a year, or

Amendment, that if an information is to be followed by the issuance of a warrant of arrest, probable cause must be shown to the magistrate and he must pass judgment on its sufficiency.[15] But it is not easily perceived, as it has been contended,[16] that this Amendment changes the character of the information. Unless a warrant is asked, it has no application.[17] A construction of the Fourth Amendment to give the court a discretion in the filing of all informations is, therefore, impossible. However, informations in the federal courts proceed in form at least with leave of court, although as a matter of practice in some districts it is an assumed rather than an actual leave.[18] It is doubtless, in part, this formal application for leave that explains denials of the prosecutor's right and assertions of judicial discretion in the matter.[19] For such statements no support has been found in the Constitution, the Acts of Congress, nor in the common law precedents. The English cases[20] which might seem to support such a view were not cases begun by *ex officio* information, and seem also to have been governed by a special statutory provision.[21]

However, there is much to be said for the position taken by the court in the principal case. A great volume of new legislation has flooded the district courts with litigation.[22] Every consideration of policy demands relief from this unparalleled situation. As matters stand, in a class of cases to which the principal case belongs, a bureau official, two thousand miles away perhaps, has the discretion to prosecute or no. It is certainly preferable that the judge should say whether the court's valuable time may be spared to try some petty offender. But this situation probably could be remedied more specifically by the creation of federal police courts with jurisdiction

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by imprisonment at hard labor, it seems, the crime is infamous. *Ex parte* Wilson, 114 U. S. 417 (1884); Mackin *v.* United States, 117 U. S. 348 (1885). *Cf.* United States *v.* Moreland, 42 Sup. Ct. Rep. 368 (1922). See 1916 U. S. COMP. STAT. ANN. § 10, 509.

[15] ". . . no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Cf.* In the Matter of a Rule of Court, 3 Woods 502 (Circ. Ct., N. D. Ga., 1877).

[16] See United States *v.* Tureaud, 20 Fed. 621 (Circ. Ct., E. D. La., 1884).

[17] As in Weeks *v.* United States, *supra*. See 3 FOSTER, FEDERAL PRACTICE, 6 ed. § 494, 2630.

[18] United States *v.* Simon, 248 Fed. 980 (E. D. Pa., 1918).

[19] United States *v.* Quaritius, 267 Fed. 227 (E. D. N. Y., 1920). See Yaffee *v.* United States, 276 Fed. 497, 499 (6th Circ., 1921); United States *v.* Maxwell, 3 Dill, 275, 280, Fed. Cas. No. 15750 (Circ. Ct., W. D. Mo., 1875).

[20] The Queen *v.* Ingham, 14 Q. B. 396 (1849); The King *v.* Kennedy, 86, L. T. Rep. 753 (1902). See Indictable Offenses Act, 11 & 12 VICT., c. 42, § 9.

[21] In Louisiana a statute expressly requiring consent of court to proceedings by information has been construed to allow very little, if any, discretion to the judge. State *v.* Judge of Tenth Judicial Circuit, 33 La. Ann. 1222 (1881); *Cf.* State *v.* Cole, 38 La. Ann. 843 (1886).

[22] Comparing the Reports of the Attorney General for the years 1900 and 1921, it is seen that during the fiscal year ending June 30, 1900, 17,033 criminal prosecutions had been terminated, leaving pending in the District and Circuit Courts 10,047. During the fiscal year ending June 30, 1921, 47,299 criminal prosecutions were terminated, and 57,112 were pending July 1, 1921, in the District Courts. See REPORT OF THE ATTORNEY GENERAL (1900) 68–71; REPORT OF THE ATTORNEY GENERAL (1921) 151.

over lesser offenses. If so, there is no reason to increase the present number of devices affording flexibility, and invade, in so doing, the province of the prosecuting attorney in whom normally the discretion lies.

WAIVER OF THE PRIVILEGE FROM COMMENT ON FAILURE TO TESTIFY. — By almost universal legislation in the United States the accused is protected from any inference from his failure to take the stand.[1] This privilege is held to extend to preliminary proceedings such as an application for bail,[2] a hearing on *habeas corpus*,[3] or the preliminary examination before a justice of the peace,[4] as well as to the trial before a jury. It is also regarded as extending throughout the prosecution, the failure of the accused to testify at an earlier proceeding not being subject to comment in the later proceeding when he elects to remain silent in the latter.[5] But when the accused takes the stand in the later proceeding the question at once arises whether he has not thereby waived his privilege. In the majority of jurisdictions the accused is held to have waived his privilege against self-crimination to the extent of being subject to answer all questions relevant to the issue,[6] or to suffer unfavorable comment upon his failure so to answer.[7] But does it follow that he should be held to have waived his privilege from comment on his failure to take the stand in some earlier proceeding? The legislature by the prohibition of comment upon silence is adopting the policy that the failure of a defendant to testify is to have no significance, the elimination of comment being necessary to make such a policy effective, as emphasis of the silence of the accused before the jury would naturally lead the jury to attach significance to such silence.[8] The purpose of the adoption of such a policy is to avoid placing any pressure upon the defendant to take the stand.[9] In spite of the recent tendency of opinion in favor of compelling the defendant to testify in his own

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[1] For the phrasing of the various enactments, see 1 WIGMORE, EVIDENCE § 488. For cases construing these statutes, see 3 ANN. CAS. 164, note; 20 ANN. CAS. 1273, note; ANN. CAS. 1917, D. 278.

[2] Newman *v.* Commonwealth, 28 Ky. Law. 81, 88 S. W. 1089 (1905).

[3] Swilley *v.* State, 73 Tex. Cr. Rep. 619, 166 S. W. 733 (1914).

[4] Bunckley *v.* State, 77 Miss. 540, 27 So. 638 (1900).

[5] Templeton *v.* People, 27 Mich. 501 (1873); Parrott *v.* Commonwealth, 47 S. W. 452 (Ky., 1898).

[6] People *v.* Johnston, 228 N. Y. 332, 127 N. E. 186 (1920); Carpenter *v.* State, 193 Ala. 51, 69 So. 531 (1915). Commonwealth *v.* Nichols, 114 Mass. 285 (1873).

[7] Caminetti *v.* United States, 242 U. S. 470 (1917); State *v.* Larkin, 250 Mo. 218, 157 S. W. 600 (1913); State *v.* Ober, 52 N. H. 459 (1873). See 4 WIGMORE, EVIDENCE, § 2276, for a discussion of the extent of the waiver in jurisdictions taking a different view.

[8] Some statutes not only prohibit comment but require the court to caution the jury against drawing any inference from the defendant's silence. See WHARTON, CRIMINAL EVIDENCE, 10 ed., § 435, where this procedure apart from statute is supported.

[9] For a discussion of the purpose of the privilege, see Wilson *v.* United States, 149 U. S. 60, 66 (1893). See also 4 WIGMORE, EVIDENCE, § 2272.